

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LAURA BRADSHAW,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 14-cv-05254 JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United States Magistrate Judge, ECF No. 6). This matter has been fully briefed (*see* ECF Nos. 14, 15, 16).

In this case, the ALJ failed to provide specific and legitimate reasons supported by substantial evidence in the record to discount the opinion of an examining psychiatrist

1 and failed to include in the RFC physical limitations identified by an examining
2 physician. Therefore, this matter must be reversed and remanded pursuant to sentence
3 four of 42 U.S.C. § 405(g) to the ALJ for further consideration.

4 BACKGROUND

5 Plaintiff, LAURA BRADSHAW, was born in 1972 and was 37 years old on the
6 alleged date of disability onset of October 25, 2009 (*see* Tr. 52-53). Plaintiff completed
7 high school and some college (Tr. 663). Plaintiff has work experience as a Certified
8 Nursing Assistant, care giver, receptionist, cashier and hair stylist (Tr. 97-109). Plaintiff
9 was fired from her last job as a Certified Nursing Assistant because she was sick too
10 often (Tr. 676).

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12 According to the ALJ, plaintiff has at least the severe impairments of
13 “gastroparesis, depression, cannabis abuse, attention deficit hyperactivity disorder by
14 history, fibromyalgia, and scoliosis (20 CFR 404.1520(c))” (Tr. 14).

15 At the time of the hearing, plaintiff was living in a mobile home on two acres with
16 her husband and two teenage children (Tr. 663-64, 675).

17 PROCEDURAL HISTORY

18 Plaintiff’s application for disability insurance (“DIB”) benefits pursuant to 42
19 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following
20 reconsideration (*see* Tr. 26-27). Plaintiff’s requested hearing was held before
21 Administrative Law Judge Scott R. Morris (“the ALJ”) on May 31, 2012 (*see* Tr. 652-
22 93). On August 28, 2012, the ALJ issued a written decision in which the ALJ concluded
23 that plaintiff was not disabled pursuant to the Social Security Act (*see* Tr. 12-25).
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1 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or
 2 not the ALJ provided legitimate reasons for rejecting the medical opinion of Dr. Khaleeq;
 3 (2) Whether or not the ALJ's residual functional capacity ("RFC") finding is incomplete,
 4 as it did not include the need for hourly bathroom breaks as identified by Dr. Pfeiffer; (3)
 5 Whether or not the ALJ provided any germane reasons to reject plaintiff's husband
 6 statement; and (4) Whether or not the ALJ provided clear and convincing reasons for
 7 finding that plaintiff's testimony was not credible (*see* ECF No. 14, p. 2).

8 STANDARD OF REVIEW

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 10 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
 11 denial of social security benefits if the ALJ's findings are based on legal error or not
 12 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
 13 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
 14 1999)).

15 DISCUSSION

16 **(1) Whether or not the ALJ provided specific and legitimate reasons for** 17 **rejecting the medical opinion of Dr. Khaleeq.**

18 Plaintiff argues that the ALJ committed error in his evaluation of examining
 19 psychiatrist Dr. Erum Khaleeq M.D.'s report of March 12, 2011 (ECF No. 14, page 4
 20 (*citing* Tr. 212-16)). The ALJ summarized Dr. Khaleeq's conclusion that plaintiff "...
 21 would have difficulty performing work activities on a consistent basis, would be unable
 22 to maintain regular attendance, and would be unable to interact with coworkers and the
 23 public" (Tr. 22, *summarizing* Tr. 215-16). The ALJ gave "little weight" to Dr. Khaleeq's
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1 conclusion because he found that it was inconsistent with plaintiff's performance on the
2 Mental Status Examination (Tr. 22). Instead, the ALJ gave great weight to the opinion of
3 state agency non-examining psychologist, Dr. Leslie Postovoit, Ph.D., who evaluated
4 plaintiff's mental examinations conducted by other doctors and concluded that plaintiff
5 could work (Tr. 22). Dr. Postovoit's conclusion was affirmed by another nonexamining,
6 reviewing state agency psychologist, Dr. Thomas Clifford, Ph.D. (Tr. 22).

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8 "In order to discount the opinion of an examining physician in favor of the opinion
9 of a nonexamining medical advisor, the ALJ must set forth specific, *legitimate* reasons
10 that are supported by substantial evidence in the record." *Van Nguyen v. Chater*, 100 F.3d
11 1462, 1466 (9th Cir. 1996) (*citing Lester v. Chater*, 81 F.3d 821, 831 (9th Cir. 1995)).

12 An examining physician's opinion is "entitled to greater weight than the opinion
13 of a nonexamining physician." *Lester, supra*, 81 F.3d at 830 (citations omitted); *see also*
14 20 C.F.R. § 404.1527(c)(1) ("Generally, we give more weight to the opinion of a source
15 who has examined you than to the opinion of a source who has not examined you"). A
16 nonexamining physician's or psychologist's opinion may not constitute substantial
17 evidence by itself sufficient to justify the rejection of an opinion by an examining
18 physician or psychologist. *Lester, supra*, 81 F.3d at 831 (citations omitted). However, "it
19 may constitute substantial evidence when it is consistent with other independent evidence
20 in the record." *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (*citing*
21 *Magallanes v. Bowen*, 881 F.2d 747, 752 (9th Cir. 1989)).
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1 Here, although Dr. Kaleeq's opinion is contradicted by opinions of reviewing state
2 psychologists, who presumably reviewed the same MSE results as the ALJ, neither the
3 state agency psychologists, nor the ALJ provided "specific, legitimate reasons" that were
4 "supported by substantial evidence in the record" to support the conclusion that plaintiff
5 would not have difficulties maintaining regular and consistent performance in a work
6 setting (*see Van Nguyen, supra*, 100 F.3d at 1466). Although the ALJ noted that certain
7 of the results in the MSE were consistent with his conclusions, there were other results
8 that were not. For instance, when Dr. Khaleeq performed the MSE, plaintiff could only
9 remember 1/3 words after five minutes and was inaccurate in her ability to perform serial
10 3's (Tr. 214). The ALJ, and the reviewing psychologists, failed to explain how these
11 limitations in the MSE were consistent with their conclusion. Dr. Khaleeq relied on this
12 MSE to support his conclusions. The Court notes that "experienced clinicians attend to
13 detail and subtlety in behavior, such as the affect accompanying thought or ideas, the
14 significance of gesture or mannerism, and the unspoken message of conversation. The
15 Mental Status Examination allows the organization, completion and communication of
16 these observations." Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental*
17 *Status Examination 3* (Oxford University Press 1993). "Like the physical examination,
18 the Mental Status Examination is termed the *objective* portion of the patient evaluation."
19 *Id.* at 4 (emphasis in original). An examining psychiatrist is able to observe these
20 subtleties, and a reviewing psychologist cannot. Furthermore, an examining psychiatrist
21 is trained to use these observations to form an opinion, and an ALJ is not. Thus, in the
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1 absence of any other substantive reasons for discounting the examining psychiatrist's
2 conclusions, the ALJ committed legal error in rejecting that opinion.

3 As noted in *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990) “[J]udges,
4 including administrative law judges of the Social Security Administration, must be
5 careful not to succumb to the temptation to play doctor. The medical expertise of the
6 Social Security Administration is reflected in regulations; it is not the birthright of the
7 lawyers who apply them. Common sense can mislead; lay intuitions about medical
8 phenomena are often wrong”) (internal citations omitted)). The ALJ in this instance was
9 attempting to evaluate the MSE and, in essence, substitute his analysis for the analysis of
10 an examining psychiatrist.
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12 Nor does the ALJ’s reliance on the fill-in-the-blank evaluation by the State
13 Agency reviewing psychologist cure this error. Reviewing psychologist Dr. Postovoit
14 provided no substantive reasoning for discounting the evaluation by Dr. Khaleeq. His
15 one-page written evaluation simply states that “there were no major limitations identified
16 in the MSE” (*see* Tr. 149). Even defendant admits that neither the ALJ nor the state
17 consultant clarified what aspects of the MSE they felt directly contradicted Dr. Khaleeq’s
18 opinions (*see* ECF No. 15, p. 10 (“It is not, however, clear what aspects of the mental
19 status examination the ALJ felt directly conflicted with Dr. Khaleeq’s opinion regarding
20 Plaintiff’s ability to interact with the public, or to complete a workday without
21 interruption from her current psychiatric condition”) (*citing* Tr. 22, 215-16)). The brief,
22 conclusory opinion of the state agency reviewing psychologist is insufficient to provide
23 substantial evidence in support of the ALJ’s decision. *See Widmark v. Barnhart*, 454 F.3d
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1 1063, 1066, 1066 n.2 (9th Cir. 2006) (“brief, conclusory opinion of the state agency
2 reviewing physician” is insufficient to provide specific legitimate reasons for rejecting an
3 examining physician’s opinion) (*quoting Lester, supra*, 81 F.3d at 831).

4 Because the ALJ failed to provide specific and legitimate reasons supported by
5 substantial evidence in the record to reject Dr. Khaleeq’s opinion, this matter must be
6 reversed.

7 Contrary to plaintiff’s assertion, this Court need not credit Dr. Khaleeq’s opinion
8 as true and direct the Administration to immediately award benefits. Although that may
9 be the case in some circumstances (*see Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.
10 1995); *Garrison v. Colvin*, ___ F.3d ___, No. 12-15103, 2014 WL 3397218 (9th Cir. July
11 14, 2014)), such is not the case when the ALJ had contrary opinions by a state agency
12 consultant and other evidence that the ALJ must consider in order to resolve conflicts in
13 the evidence. For instance, the ALJ here specifically found that plaintiff’s activities,
14 including her ability to paint her kitchen, demonstrated that plaintiff was “capable of
15 sustaining basic work activities” (Tr. 21 (*citing* Tr. 480)). These are inconsistencies in
16 the record that this Court should not attempt to resolve.

17 Generally, when the Social Security Administration does not determine a
18 claimant’s application properly, “the proper course, except in rare circumstances, is to
19 remand to the agency for additional investigation or explanation.” *Benecke v. Barnhart*,
20 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
21 forth a “test for determining when [improperly rejected] evidence should be credited and
22 an immediate award of benefits directed.” *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
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1 Cir. 2000) (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). It is
 2 appropriate when:

3 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such
 4 evidence, (2) there are no outstanding issues that must be resolved before a
 5 determination of disability can be made, and (3) it is clear from the record
 6 that the ALJ would be required to find the claimant disabled were such
 7 evidence credited.

8 *Harman, supra*, 211 F.3d at 1178 (*quoting Smolen, supra*, 80 F.3d at 1292).

9 Here, as noted above, outstanding issues must be resolved. *See Smolen, supra*, 80
 10 F.3d at 1292. The ALJ must reevaluate Dr. Khaleeq's conclusions, using the correct
 11 standard of review. Since there is some evidence to contradict his conclusions, the ALJ
 12 is charged with the responsibility of resolving those conflicts.

13 (2) **Whether or not the ALJ's residual functional capacity ("RFC") finding
 14 is incomplete, as it did not include the need for hourly bathroom
 15 breaks as identified by Dr. Pfeiffer.**

16 Dr. Peter Pfeiffer, M.D. performed a physical examination of plaintiff on behalf of
 17 the State of Washington (*see* Tr. 208-11). He concluded that plaintiff's gastroparesis,
 18 resulted in her frequent toileting, requiring breaks every "hour continuously during the
 19 day" (Tr. 211). The ALJ acknowledged Dr. Pfeiffer's opinion (Tr. 21), but did not
 20 include this limitation in his RFC (Tr. 16). Defendant acknowledges that the ALJ did not
 21 reject Dr. Pfeiffer's opinion that plaintiff needed to take frequent bathroom breaks (ECF
 22 No. 15, p. 11), but argues that the ALJ's observations regarding plaintiff's activities of
 23 daily living were sufficient to provide a specific and legitimate reason to object Dr.
 24 Pfeiffer's opinion (*id.*).

1 According to the Ninth Circuit, “[l]ong-standing principles of administrative law
2 require us to review the ALJ’s decision based on the reasoning and actual findings
3 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the
4 adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1225-26
5 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation
6 omitted)); *see also Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“we may not
7 uphold an agency’s decision on a ground not actually relied on by the agency”) (*citing*
8 *Chenery Corp, supra*, 332 U.S. at 196).

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10 Because the ALJ failed to provide a specific and legitimate reason for rejecting Dr.
11 Pfeiffer’s limitation regarding frequent use of toilet, this constituted legal error. This
12 Court will not attempt to intuit what the ALJ was thinking when he failed to account for
13 this limitation. Because this limitation was not included in plaintiff’s RFC, this error is
14 not harmless (*see Molina, supra*, 674 F.3d at 1117-22; *see also*, 28 U.S.C. § 2111;
15 *Shinseki v. Sanders*, 556 U.S. 396-407 (2009)).

16 On the other hand, because the record reveals at least one instance where plaintiff
17 presented to the emergency room and did not demonstrate the symptoms of frequent
18 toileting, this apparent conflict must be resolved by the ALJ (*see e.g.*, Tr. 256).

19 For the above reasons, this matter must be remanded to the ALJ for further
20 consideration.

21 Finally, because the ALJ’s consideration of plaintiff’s credibility and the lay
22 testimony depends in part, on a proper evaluation of the medical evidence, and because
23 the Court already has concluded that this matter must be reversed and remanded for
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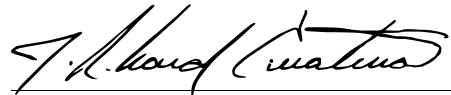
1 further consideration of the medical evidence, this Court need not further review alleged
2 errors regarding those findings and, instead, instructs the ALJ to reevaluate the record as
3 a whole.

4 CONCLUSION

5 Based on these reasons and the relevant record, the Court **ORDERS** that this
6 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
7 405(g) to the Acting Commissioner for further proceedings consistent with this Order.

8 **JUDGMENT** should be for plaintiff and the case should be closed.

9 Dated this 15th day of September, 2014.

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12 J. Richard Creatura
13 United States Magistrate Judge
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